BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

WALTER P. POPE	)	
Claimant	)	
VS.	)	
	)	Docket No. 237,559
OVERNITE TRANSPORTATION COMPANY	)	
Respondent	)	
Self-Insured	)	

ORDER

Respondent requested review of the preliminary hearing Order entered by Administrative Law Judge Steven J. Howard on March 31, 1999.

ISSUES

The issues for Appeals Board review are:

1. Whether claimant failed to provide respondent with notice of accidental injury within the time required by K.S.A. 44-520.

2. Whether claimant failed to provide respondent with timely written claim pursuant to K.S.A. 44-520a.

FINDINGS OF FACT

After reviewing the preliminary hearing record and considering the briefs of the parties, the Appeals Board finds as follows:

1. Claimant filed a form E-1 Application for Hearing on October 12, 1998 alleging a series of accidents beginning February 2, 1998 and continuing to "current" due to "constant opening & closing of overhead trailer door." Similarly, the form E-3 Application for Preliminary Hearing alleges a series of accidents beginning February 2, 1998 and continuing to the present. The March 31, 1999 preliminary hearing Order does not contain a date of accident finding. But, implicit in the ALJ's award of benefits is a finding of timely notice and written claim.

2. Respondent admits claimant sustained a low-back injury on or about February 1, 1998. Respondent also introduced an Employee's Report of Work Injury that claimant completed and delivered to respondent on September 4, 1998 alleging a

February 1, 1998 injury. Respondent contends this was the first written claim as well as the first notice of accident it received from claimant.

3. Claimant admits the first time he gave notice of a work-related injury was September 4, 1998, the day after his MRI, when he completed the accident report form and gave it to Michael David and Rusty Darby, respondent's acting human resources or personnel director. At that time claimant also requested medical treatment under workers compensation.

4. Claimant began working for respondent in September 1987. His job as a city driver required him to make pickups and deliveries within a 100 mile radius of respondent's terminal. His duties included loading and unloading freight at approximately 10 to 15 stops per day. The weight of freight varied. Claimant testified "we will pick up anything from feathered pillows to granite stones. There is no limitations to what we do."

5. Claimant described having problems with the overhead door of his delivery truck between February 2 and September 3 of 1998. He testified that during this period he developed low back pain that went into his left buttocks and then into his left leg. He attributed this pain to the repetitive lifting of the overhead doors and moving freight. Although he sought treatment, he did not miss work due to this condition until September 4, 1998.

6. Claimant testified that he initially sought chiropractic treatment. "This went on for four, five months probably, and I was not getting any relief, the condition was continually getting worse and at that time I went in to see my medical physician."

7. Claimant first sought treatment for his back on February 12, 1998 with Tanya Schupbach, D.C. Her records describe the onset of claimant's low back symptoms as two weeks before this appointment. Thereafter, claimant obtained treatment from two other chiropractors, Dr. Jimmy Williams and Dr. Brian Lane. Claimant next sought treatment from his family physician, David Ramirez, M.D., on July 8, 1998. Claimant gave Dr. Ramirez a history of low back pain since February 1998. On the May 30, 1998 history form apparently completed for Dr. Lane or Dr. Williams which asked what his problem is due to he checked the boxes for "no particular cause" and "work related injury."

8. None of the medical records introduced show a history of gradual onset of pain due to repetitive use or specify a worsening of claimant's condition from work activities after February 1998. But claimant testified that he continued performing his job as usual and this caused his back pain to worsen including the pain into the buttocks and legs. He was not given any work restrictions or taken off work until after the MRI on September 3, 1998, which revealed a herniated disc at L4-5.

9. Although claimant had back surgery in 1974 he said he had recovered fully and was not having any back problems before this injury. He admitted, however, that he had been

seeing a chiropractor on a regular basis before February 1998 but just "for an overall adjustment."

10. Claimant denied any specific event caused his injury. Instead, he just developed back pain in early February 1998 while working. When asked to compare his symptoms in February to his condition in September 1998, claimant answered that it had changed "pretty dramatically." The pain had progressively worsened during that period to the point where the back pain was shooting down the leg and he could not bend over.

CONCLUSIONS OF LAW

Respondent contends claimant failed to provide timely notice of his accidental injury and failed to timely file a written claim for compensation. But a resolution of the dispute over the applicable date of accident is dispositive of both issues raised by respondent.

When dealing with injuries that are caused by overuse or repetitive micro-trauma, it can be difficult to determine the injury's cause. It is also often difficult to determine the injury's date of commencement and conclusion. In those situations, injured workers should not be held to absolute precision when considering the requirements of notice and written claim. The test should be whether the employer was placed on reasonable notice of a work-related injury. The recent Kansas appellate court decisions concerning accident date appear consistent with this philosophy.[1] The last date worked rule first announced in Berry[2] has been interpreted to also establish the date of accident for computing the time for giving notice and written claim.[3]

K.S.A. 44-520 requires notice of accidental injury be given to the employer within 10 days. The time for giving notice can be extended up to 75 days for just cause. But just cause is not an issue here. Claimant knew he was injured and attributed his injury to his work duties long before he gave notice. Although he was able to continue working and may not have known the precise cause for his pain or the severity of his injury, just cause has not been argued or alleged. Instead, the parties focus on accident date and a

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[1] *See* Alberty v. Excel Corporation, 24 Kan. App. 2d 678, 951 P.2d 967, *rev. denied* 264 Kan. ___ (1998); Durham v. Cessna Aircraft Company, 24 Kan. App. 2d 334, 945 P.2d 8 (1997); Condon v. Boeing Co., 21 Kan. App. 2d 580, 903 P.2d 775 (1995).

[2] Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

[3] The bright line rule first announced in Berry was only intended to establish a single date of accident for the purpose of computing the award. Condon extended the legal fiction of a single accident date to determine what law would apply to the claim. But this does not mean that the injury in fact occurred on only one day. By definition, a repetitive trauma injury occurs over a period of time and, as in this case, medical treatment can be needed before the "date of accident." Therefore, the fact that we are dealing with a series of accidents cannot be lost sight of when determining a single "date of accident" for legal purposes in applying the Workers Compensation Act.

determination of that issue will be dispositive of all issues because either claimant suffered a single traumatic injury on or about February 1 or 2 of 1998 or claimant sustained injury by a series of accidents until he left work on September 4, 1998.

Based primarily upon claimant's testimony that he did not suffer a specific traumatic event and that his condition progressively worsened until he was no longer able to perform his job, the Appeals Board finds that it is more probably true than not that claimant suffered a series of accidental injuries or aggravations. Therefore, the date of accident for determining the timeliness of the notice of written claim is September 3, 1998, the last day claimant actually performed work. Based upon that accident date, claimant has satisfied the reporting requirements of the Act. The Appeals Board finds claimant has proven a work-related injury from a series of mini-traumas beginning approximately February 1, 1998 and continuing each and every working day up through his last day worked before leaving work due to his injury on or about September 3, 1998.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the March 31, 1999 preliminary hearing Order entered by Administrative Law Judge Steven J. Howard should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of June 1999.

BOARD MEMBER

c: Kip A. Kubin, Overland Park, KS
Jeff S. Bloskey, Overland Park, KS
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director